

ENDING SEXUAL VIOLENCE THROUGH TRANSFORMATIVE JUSTICE

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Abstract

Sexual violence is used to maintain what Dr. Riane Eisler (1990) conceptualizes as the dominator model of society. The early days of the feminist anti-violence movement focused on changing the dominator model, but, in part, this focus was co-opted by seeking criminal justice solutions, contributing to punitive responses and mass incarceration that have been ineffective in ending sexual violence. The racist history of the rape charge and its disproportionate effect on people of color, an effect that continues today. Legislators have passed draconian laws that uniquely apply to anyone convicted of a sex offense, the definition of which has been broadened to encompass harmless behavior. A separate legal regime for sex offenders that isolates them from society and marks them for life as monsters obfuscates the causes of sexual violence and contributes to the problem. The feminist anti-violence movement remains influential, though little recognized, in today's efforts to respond to sexual violence through restorative justice and transformative justice. A number of groups have adopted the RJ/TJ model, in particular women of color. The article provides examples of successful and unsuccessful implementation of RJ/TJ and discusses impediments to wider adoption of this approach. RJ/TJ is a promising alternative to the current criminal justice response to sexual assault, one that will bring us closer to a partnership culture.

Keywords: sexual violence; criminal justice; restorative justice; transformative justice; feminist anti-violence movement; rape; rape and racism; mass incarceration; sex crimes; collateral consequences

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INTRODUCTION

Violence against women, children, and vulnerable others has been endemic in societies around the world throughout recorded history. In the United States, nearly one in five women and one in 71 men (not including sexual assault victims in jails, prisons, and other detention facilities) have experienced rape or attempted rape at some point in their lives (Black, 2010). A higher percentage have experienced other forms of sexual violence: nearly one in two women (44.6%) and one in five men (22.2%). Sexual violence is the most underreported crime (Rennison, 2002). It remains a widespread problem despite decades of efforts by the feminist antiviolence movement (FAM), the criminal justice system, and civic institutions.

The genesis of sexual violence lies in the dominator model that replaced more egalitarian societies grounded in the “partnership way,” conceptualized by Riane Eisler in her ground-breaking book of the same name (Eisler, 1990). The dominator model is “An operating social system characterized by an authoritarian and inequitable family, social, political, and economic structure of rigid hierarchies of domination with a high degree of fear, abuse, and violence,” which covers patriarchy, racism, classism, and other systems based on hierarchies of power (Mercanti, 2015, p. 8). As a way of ordering society and relationships, the domination/submission structure was not willingly accepted by all those it sought to subordinate, requiring the use of violence and coercion that remain with us to this day. In this article, I will focus on modern resistance and struggle against that system in one of the ways it maintains power - through sexual violence.

HISTORY OF THE GRASSROOTS FEMINIST ANTIVIOLENCE MOVEMENT

At the outset, it is important to distinguish among the grassroots feminist antiviolence movement (FAM), the prosecutors’ victim/witness (V/W) programs, and the broader Victims Rights Movement (VRM) (Young & Stein, 2004). The V/W programs were

designed to help victims navigate the criminal justice system (CJS). Many V/W programs arose from the grassroots FAM. The VRM began in the 1970s with Families and Friends of Missing Persons (1974) and Parents of Murdered Children (1978 (<http://www.crimevictimsunited.org/history/>)). These organizations did not have a radical analysis of the cultural causes of violence and the role of the state in oppressing marginalized groups, as the FAM did. The VRM provided support to victims or their surviving families, while advocating for harsher penalties for the accused and rights for victims within the CJS (Shaw, Aziz, & Chamberlain, 2005). As discussed below, the FAM was leery of involvement with the CJS and engaged in much debate about working with it.¹ Nevertheless, critics of the hugely metastasized CJS often unfairly blame the FAM for harsher laws and mass incarceration by failing to distinguish among the three quite different groups (Lancaster & Levine in Halperin & Hoppe (Eds.), 2017).

In the 1970s, women organized to challenge the impunity granted to men who sexually and physically assault women. The Feminist Antiviolence Movement's theory was not reformist but rather radical, as articulated by the Chicago Women Against Rape statement of purpose (quoted in Schechter, 1982), which read in part:

Rape violently reflects the sexism in a society where power is unequally distributed between women and men, Black and white, poor and rich.... In rape, the woman is not a sexual being but a vulnerable piece of public property; the man does not violate society's norms so much as take them to a logical conclusion. (Schechter, 1982, p. 15)

In her history of the battered women's movement, Susan Schechter (1982) points to that movement's roots in the anti-rape movement and explains that in the early days of the battered women's movement, "many women understood that reforms within a

¹ As legal counsel for the Oregon Coalition Against Domestic and Sexual Violence, I was named plaintiff in the Oregon ACLU lawsuit against a victims' rights amendment to the constitution. (*Armatta v. Kitzhaber*, 1998). I joined the suit because the amendment would have increased victims' rights by reducing rights of defendants, including allowing non-unanimous jury verdicts in murder cases.

racist and sexist society would not protect all women, nor would they eliminate rape” (p. 37). She quotes Susan Griffin’s 1971 essay:

Rape is not an isolated act that can be rooted out from patriarchy without ending patriarchy itself. The same men and power structure who victimize women are engaged in the act of raping Vietnam, raping Black people, and the very earth we live upon....No simple reforms can eliminate rape.

(Griffin, 1971, p. 35).

The FAM’s radical analysis was reflected in its emphasis on grassroots organizing, consciousness raising groups, rallies, and Take Back the Night marches.

Once the victim-blaming silence over sexual assault was broken, a flood of women came forward. Their needs were greater than telling their stories, as powerful as that was. They needed safety, information, help to heal and regain control over their lives, and, for some, medical attention and assistance in dealing with the criminal justice system. When the movement expanded to address intimate violence beyond sexual assault, they needed safe shelter for themselves and their children. The demand for services soon overwhelmed the ability of a predominately volunteer and unfunded movement to respond. It also began to overshadow the social change agenda.

STATE COOPTATION AND LOSING THE SOCIAL CHANGE FOCUS

In addition to organizing, community outreach, and direct services, the FAM successfully lobbied for changes in laws that made women’s accusations of rape suspect, required corroboration, privileged men to rape their wives, and allowed consideration at trial of a victim’s past sexual conduct and character. They advocated policy reforms, and trained police, prosecutors, and other professionals. The intent was to erode acceptance of violence against women as normal, change society’s response to it, and, ultimately, end it.

Success in exposing violence against women contributed to undermining the FAM's social change agenda. Forced to acknowledge this widespread crime, the state responded by funding services, initially with grants from the federal Law Enforcement Assistance Administration, later under the Violence Against Women Act. This allied the interests of a radical grassroots movement with the state it sought to transform.

While the FAM made critical progress in increasing awareness and providing redress and safety, it also inadvertently strengthened the CJS. Grassroots advocates targeted the CJS for reform, since many victims looked to it for safety and redress, which it had rarely provided because of misogynistic myths that women lie about or provoke sexual assault. In addition, attacking these myths and increasing rape victims' accessibility to the CJS was perceived as a way to effect social change. However, as Native American (Cherokee) and antiviolence activist Andrea Smith points out, “[R]eliance on the criminal justice system to address gender violence would make sense if the threat were a few crazed men whom we can lock up” (Schechter, p. 257). Other movement activists recognized this as well.

At the Color of Violence Conference in 2000, Dr. Beth Richie, an early leader in the FAM, observed that focus on changing the CJS undermined the radical nature of the movement:

[T]he co-optation of the antiviolence movement can be traced in part to the moment when the movement chose to argue that domestic [and sexual] violence was a ‘crime.’ The state, rather than recognized for its complicity in gender violence, became the institution promising to protect women from domestic and sexual violence.

(Smith, 2010, pp. 255-257)

A brief dip into the archives of the Feminist Alliance Against Rape (FAAR) shows this was a concern as early as 1974:

As rape is given more publicity, more money and energy is spent prosecuting and convicting rapists. How is this after-the-fact action helping us as women?... Incarceration does not change the societal attitudes which promote rape. In a society that deals with symptoms rather than causes of problems, prisons make perfect sense. Confronting the causes of rape would threaten the basic structure of society.

By actively encouraging women to prosecute a rape we are helping to reinforce the legitimacy of the criminal justice system. This system convicts primarily poor and non-white men for a crime that we know is universally committed by men. . . . But most important, prison is vindictive -- it is not concerned with change but with punishment. And its real social function is similar to that of rape -- it acts as a buffer, as an oppressive institution where a few scapegoats pay for the ills of society.

(MacMillan & Klein, 1974)

The editors who wrote the FAAR article recognized that no alternatives to the CJS existed at that time, but stated that the feminist movement against rape should begin to actively seek alternatives. Today, a number of activists in the FAM are engaged in creating alternatives to the highly punitive CJS, one that strengthens community, safety, and healing (Ptacek, 2010).

CONTRIBUTING TO THE IDEOLOGY OF PUNISHMENT

Once the dirty secret of widespread sexual assault was exposed, society, caught up in a “tough on crime” wave, responded through the CJS, focusing punitive measures on individual offenders. Rare cases of stranger kidnapping and rape of children, sensationalized by the media, instilled fear in the public and led politicians to enact draconian laws that applied to ever more innocent behaviors, such as streaking, sexting, mooning, and consensual teen sex, as well as forcible rape (Halperin, 2017; Madar,

2014). Legislatures punished more crimes with prison and increased the length of sentences, with state control extending long after completion. Laws passed uniquely for those convicted of sex offenses include public registries; notification of the offender's community; "no-go" zones, in some cases resulting in banishment from entire cities (Wakefield, 2016); and restrictions on employment, communication, travel, and association (including with one's own children). In some cases, offenders are involuntarily and indefinitely committed to mental institutions without due process after completing a prison sentence (Janus & Prentky, 2008). In applying these restrictions, little consideration is given to the seriousness of the crime. A 16-year-old who sends a nude photo of herself to her boyfriend will be designated a sex offender for life just as a serial rapist is. Though sex offenders have the lowest recidivism rate (5.6%) of all crimes other than murder, punitive post-prison disabilities apply far into the future (Durose, Cooper, & Snyder, 2006).

Nearly 850,000 people have been swept up in this hysteria and placed on public sex offender registries (Halperin, 2017, p. 13). Lives have been ruined or ended by vigilante violence or suicide (Human Rights Watch, 2007 p. 91). Yet, harsh punishment and ostracism increase the likelihood that offenders will engage in more crimes (though primarily non-sex offenses), both to survive and from the effects of the hyper-masculine and dominance-structured prison environment that replicates the dominator paradigm on which sexual assault is based. Society's focus on individual punishment fails to address root causes, which assures that those with less power and status, women and children in particular, will continue to be subjected to sexual assault and abuse.

MONSTERS

"Brutality may result when unequal power is combined with the perception of unequal humanity. That is, when a group with power perceives a group with lesser power as 'sub-human' in some way" (Gross, 2008, p. 5).

We have created an out-group of monsters, who live with the mark of Cain and can be banished from our communities. “Sex offenders are one of the most despised groups of people in American society—along with terrorists and perpetrators of genocide” (Zilney & Zilney, 2009, p. xiii). Creating a hated and feared scapegoat exempts everyone else from responsibility. Generation Five, an activist group targeting child sexual abuse, states:

We live inside a set of stories about child sexual abuse which shape how most of us make sense of the world. A common one is that child sexual abuse is committed by just a few bad people who need to be found and weeded out. This story is used to justify policies, laws, and practices that focus on punishment, surveillance, and isolation. Individuals who are identified as having sexually abused a child or children are arrested, ostracized, dehumanized, and isolated. We are meant to believe, through this story, that if we know who “the bad guys” are, we can take adequate precautions to prevent the children we know from being harmed. There is little evidence that any of these interventions are effective in changing the behavior of individuals who have sexually abused children. This story also misses the critically important fact that incidences of child sexual abuse do not happen in a vacuum....

We believe that the first story—the dominant story of our culture—remains popular for exactly this reason: it protects us from having to confront the prevalence and the proximity of child sexual abuse.

(Shara, 2017, p. ii).

Or the fact that those caught abusing children are no different than we are: “If you looked at a graph that charted the profile and demographics of child sexual offenders in the United States, it would match the profile and demographics of the average adult man in the country” (Generation 5, 2017b, June, p. ii).

This hyper-focus on “the monsters” does a disservice to all of us—it severely limits our collective ability to accurately perceive warning signs of abuse. It immobilizes people who abuse from taking responsibility for their action out of a fear of being rejected and ostracized as monsters. And, it keeps us from engaging in the challenging and rewarding work of building child-affirming family and community cultures, and challenging the social conditions that promote “power over” (domination and exploitation) rather than “power with.” (Generation 5, 2017b, June, p. 15).

SUCCESS OF PUNITIVE MEASURES?

The Bureau of Justice Statistics (BJS) reports (Planty et al., 2016) that between 1993 and 2010, sexual victimization decreased by 64%.² Another BJS study (Lauritsen & Rezey, 2013) concluded that all violent crime decreased during that time, to a similar or greater extent (76% victimization rate, 64% incidence rate) than sexual violence. Given the reduction in violent sexual assault over the last several decades, it may appear that reformist efforts, including harsher punishments and increased prosecution, have been successful. Challenging that conclusion, law professor Richard Klein (2015) comments:

After a thorough review and survey of the existing empirical studies of the impact of the rape reforms, two researchers (Bryden and Lengnick, 1997) concluded that “[t]here is growing evidence that . . . the legal reforms have generally had little or no effect on the outcomes of rape cases, or the proportions of rapists who are prosecuted and convicted.”

(Klein, 2015, p. 1031)

² The National Crime Victimization Survey from which these statistics are derived excludes anyone under 12-years-of-age, those who are institutionalized, including in prison, and those who are homeless.

Despite decades of organizing against sexual violence and even considering the noted decrease in incidents, sexual violence continues to be ubiquitous throughout society, as recently demonstrated by the exposure of sexual predation by powerful men from Harvey Weinstein to Donald Trump, and the election of the latter to the highest office in the United States. The enduring pervasiveness of sexual harassment and violence committed largely by men against women and children reveals it as a social norm, deeply embedded in our culture. Efforts to date have done little to eradicate it, directed as they are against “aberrant” individuals, overwhelmingly from marginalized communities. While crime has fallen, the US continues to imprison its people at a higher rate than any other country in the world at any time in history (The Sentencing Project, 2012).

CARCERAL PUNISHMENT IS COUNTERPRODUCTIVE

Prison does little to reduce rape and sexual assault. It replicates drivers of violence, such as toxic masculinity. Prisons are based on coercion backed up by violence; the strongest, most powerful individuals prevail. For this reason, prisoners “bulk up” through extreme exercise, join racial and ethnic gangs, and/or enter into relationships where sex is exchanged for protection. According to BJS studies (Beck et al., 2013, May; Beck & Johnson, 2008), an estimated 80,600 prison and jail inmates experienced sexual violence in one year, about half perpetrated by staff. Those convicted of violent sex crimes are assaulted and raped by other prisoners in greater numbers than prisoners who commit other crimes (Beck et al., 2013, p. 6). LGBT prisoners are abused by other inmates at a rate more than ten times higher than straight prisoners (Beck et al., 2013, p. 18).

Prisoners must submit to all-powerful corrections officers or be severely punished, including spending days, weeks, months, or years in solitary confinement. Lives are regimented; a prisoner has virtually no control over any aspect of his life. He loses his identity and in many prisons is addressed by a number. No touching is allowed, not even

to console someone for the death of a family member. Prisoners strictly control their emotions for fear of appearing weak and vulnerable to violence. Love, within a prison environment, is exceedingly rare. It does not take an expert to conclude that the brutality of this experience leads to more crime. The Bureau of Justice Statistics (Durose et al., 2016) estimates that 76.6% of prisoners are rearrested within five years of release, most for property crimes. While 60.1% of sex offenders were rearrested during that period, only 5.6% were rearrested for a sex crime (Durose et al., 2016). BJS has not published data on the percentage of those who were convicted.

ENDURING INFLUENCE OF THE FEMINIST ANTIVIOLENCE MOVEMENT

We don't have to persist in this ineffective response. Feminists and others have been creating alternatives that have received little attention from the media, another manifestation of victim-blaming and the invisibility of efforts by people of color (Lancaster, 2017; Levine, 2017). They are often adaptations of Restorative Justice (RJ) or Transformative Justice (TJ) models, several of which are discussed below, and they embody Eisler's (1990) Partnership Way of constructing society.

The feminist analysis of the cultural roots of violence against women, children, and other subordinate groups and the dominance paradigm have contributed much to today's progressive efforts. Social change has never faded from the agenda of the FAM, though it is more notable in some organizations than others. In Oregon, for example, the Coalition Against Domestic and Sexual Violence includes in its mission: "We engage in an ongoing process of analysis that sees all systems of oppression as interrelated and work to challenge the power structures that legitimize them and perpetuate injustices" (Retrieved 2017 from <http://oaasisoregon.org/take-action-change-the-culture-around-sexual-violence>). The Coalition works with a wide variety of community groups, many that have a social change agenda, including those challenging the CJS, such as the Oregon Justice Resource Center.

Grassroots organizations that incorporate feminist theory and, to some extent, are inheritors of the FAM, are creating new visions and ways of responding to sexual violence that are not based on an ‘us v. them’ approach. One of them, another Oregon program, Oregon Abuse Advocates and Survivors in Service (OAASIS), recognizes that:

Sexual violence is a community problem. The community needs to be part of the solution. Sexual violence is more than an individual’s actions; it is influenced by our cultural beliefs, practices, and structures. Together, our communities can change those influences. (<http://oaasisoregon.org/take-action-change-the-culture-around-sexual-violence>)

While these two organizations are not engaged in direct intervention, they demonstrate the vibrancy and enduring influence of the FAM.

ALTERNATIVES TO PUNISHMENT: RESTORATIVE AND TRANSFORMATIVE JUSTICE

RJ and TJ, which reflect the values of the Partnership Way, have commonalities, but differ in important ways:

Restorative justice [RJ] emphasizes repairing harms rather than punishing crimes, giving victims and offenders the opportunity to engage in dialogue around the harm, assessing the impact on the victim, and outlining the steps necessary to ensure offender accountability and meet the victim’s needs. (Frederick & Lizdas, 2010, pp.41-45)

The informal mediation practices referred to as “restorative justice” (RJ) seek to decrease the role of the state in responding to crime and increase the involvement of personal, familial, and community networks in repairing the harm caused by crime. (Ptacek, 2010, p. ix)

RJ does not take into account the effect that systems of oppression (racism, sexism, homophobia, classism, and others) have on harm caused by one individual to another. Transformative Justice, on the other hand, seeks to eradicate oppression, as well as to provide for individual healing.

[T]he core philosophy of transformative justice (TJ) [is]:

- TJ is against violence and punishment, institutionalization and imprisonment.
- Crime is a form of community-based conflict, where society and the government are also involved as possible offenders.
- TJ brings issues of identity back into the realm of justice by addressing socio-political injustices toward Women, People of Color, GLBT, Poor, Immigrants, People with Disabilities, and other marginalized groups.
- TJ believes in the value of mediation, negotiation, and community circles to transform conflicts.

(Nocella, 2011, p. 6)

Organizations and individuals have recognized and critiqued co-optation by the criminal justice system and proposed possibilities that do not reinforce the dominator system, but seek to replace it with responses that grow just, humane, and safe communities based on dignity for all members. The egalitarian nature of these communities illustrates Eisler's (1990) Partnership Way as they attempt to implement the concept of transformative (rather than punitive) justice.

Some groups (such as Common Justice), using an RJ or TJ model to address violence, include system representatives, such as prosecutors, judges, and probation and parole officers at some point in the process (e.g. Circles of Support and Accountability and Common Justice). Others (e.g. Black Youth Project 100, Generation 5, Incite!, and Communities Against Rape and Abuse) seek to avoid a system they consider oppressive.

COMMON JUSTICE

“Common Justice, a demonstration project of the Vera Institute of Justice, is a Brooklyn-based program for serious felonies that offers services to victims and an alternative to incarceration for those responsible for crime” (Sered, 2014). They work with 16- to 24-year-old defendants and those they have harmed. The project grew out of a recognition that, rather than delivering safety and justice, incarceration generates violence (Sered, 2017). In other words, our solution to crime causes more crime.

Common Justice’s restorative justice project is “the first alternative to incarceration and victim service program in the United States to focus on violent felonies in the adult courts (Sered, 2017).” It is based on four principles:

1. Responses to violence should be survivor-centered.

In the current criminal justice system, prosecutors decide on the appropriate response, whether to prosecute or dismiss; what crimes will be charged; what plea to offer, if any. If there is a trial (only in 2.8% of cases) (Clarke, 2013), the victim is at most a witness, and the prosecutor decides whether she will testify and limits what she can say; guilt or innocence is decided by the judge or jury; if the accused is found guilty, the judge determines the sentence; only at this stage can the victim express her wishes with a victim impact statement. Any power the victim has in this process is at the discretion of the prosecutor.

Moreover, the present system serves only a minority of sexual violence victims. Underrepresented populations include women of color (Black women, Asian women, Indigenous women, and Latinas), immigrants, prisoners (adults and juveniles), impoverished women (including those who are homeless), women in the sex trade, LGBTQI, and males. For example, given the system’s racism that excludes Black and

brown women from the category of victim and over-includes Black and brown men as perpetrators, victims from these communities are less likely to seek help from the criminal justice system. For similar reasons, Indigenous women may turn to community-based alternatives where they exist (Goel, p. 60. In Ptacek, 2010).³ Immigrants, especially the undocumented, face potential deportation if they report to state authorities.

Common Justice has found that when crime victims are asked what they want, it is not primarily retribution (Sered, 2017, pp. 12-15). They want to make sense of what happened to them, i.e. to form a “coherent narrative.” They want “an opportunity to express their experience and be heard.” Having been made powerless to prevent the assault, they want a way of experiencing power and control in response to the crime. They want the offender to repair the harm to the extent possible and to be held “meaningfully accountable.” “And perhaps most essentially, they don’t want the person to hurt them or anyone else ever again (Sered, 2017, pp. 12-13, referencing Herman, 1997).” Little of this is available from the criminal justice system. Nor does the CJS meet other needs such as housing, trauma-informed care, and safety.

2. Responses should be accountability-based.

As for the person who has offended, a 2016 national poll of crime survivors by the Alliance for Safety and Justice (2013) found “[O]verwhelming support—even higher than among the general public—for rehabilitative programming, alternatives to incarceration, and shorter sentences, as well as greater investments in education, mental health treatment, jobs programs, and drug treatment”. As Sered (2017) observes, this is “entirely contrary to the public and law enforcement narrative about what victims want”.

³Community Accountability models draw from historical ways of responding to violence within Native tribes. While some Indigenous communities utilize alternatives (such as Sentencing Circles) to the white criminal justice system today, they are hybrids of traditional forms of justice and state criminal justice. Goel discusses problems with this hybrid approach, including that Indigenous offenders continue to be disproportionately represented in Canadian prisons.

Common Justice identifies five key elements of accountability: 1) acknowledging responsibility for one's actions; 2) acknowledging the impact on others; 3) expressing genuine remorse; 4) taking actions to repair the harm to the degree possible; and 5) no longer committing similar harm.

That does not mean prison can be eliminated entirely. As Sered (2017) states, "Some people at risk of doing more harm will need to be separated from others, but confinement does not require degradation, and prisons around the world demonstrate that it is possible to take people's freedom without also taking their dignity and safety" (p. 19).

Where punishment is called for, it should never be excessive. The principle of parsimony is reflected in the U.S. Constitution's prohibition against cruel and unusual punishment, though parsimony is not followed in practice. The National Academy of Sciences concluded in a 2014 report that excessive punishment is morally unjustifiable (Sered, 2017, referencing Travis, Western, and Redburn [Eds.], 2014, p. 326). Moreover, as Andrea Smith suggests: "[R]ather than argue that all prisons should be dismantled tomorrow, our task is to crowd out prisons with other forms of justice-making that will eventually demonstrate both the ineffectiveness and the brutality of prisons" (Ptacek, 2010, p. 267).

Sered emphasizes that addressing individual violence is not enough. It is embedded in a social-historical context, which must be recognized, and the harm it causes (police violence against people of color, inequitable distribution of wealth, etc.) repaired before individual violence will end. To stop oppression and violence by the state, grassroots organizing is essential. One example of a grassroots organization, highlighted below, is Generation Five.

3. Responses should be safety-driven.

Prisons may provide short-term safety for the person harmed and the public, but nearly all prisoners will be released at some time (James, 2015). Moreover, prisons are brutal places operated on the dominator model, which they reinforce. Transformational Justice provides a potential alternative at least in some cases, though the different models have not been widely assessed (Sered, 2017) and the concept has its critics. “Breaking a near-exclusive reliance on prison as a tool to achieve safety will require developing deeper understanding—and more robust evidence—about what truly makes communities safer” (p. 25). Sered includes the need for researchers to explore “the ways negative and narrow conceptions of masculinity contribute to harm” (p. 25).

4. Responses should be racially equitable.

More than five times as many Black men are locked up in state prisons as white men. In five states the ratio is 10 to 1 (Nellis, 2017, p. 3). People of color make up 37% of the U.S. population but 67% of those in state and federal prisons (The Sentencing Project, Retrieved 2017). Black men are also disproportionately arrested and charged, and, once convicted, they receive longer sentences. Black and Latina women are also over-represented. At the same time, Black people and their communities receive far less protection than those of the dominant society (Sered, 2017; Muhammad, 2010; Kennedy, 2009). While white men imprisoned for sex offenses are roughly proportional to their numbers in the population, Black men are over-represented on sex offender registries (Levine & Meiners, 2016). No “reform” or alternative response can be just if it does not recognize and address this reality.

“OTHERING”

The unique experiences of marginalized communities (people of color, LGBTQI, immigrants, those who are disabled, homeless, impoverished, non-English-speaking, or non-Christian) have not been substantially incorporated into the feminist or state response to violence against women and children, despite early leadership and

continued efforts by women of color, lesbians, and others. Dominant white heterosexual society has ignored their work, thus reinforcing the existing power structure, which in the U.S. owes much to sexual violence against Black and indigenous women and the construction of the Black male rapist.

One quarter of the nearly 4,000 lynchings in 12 Southern states between 1877 and 1950 were of Black men accused of raping white women. The terror of lynching emerged as a way to control former slaves following Emancipation (Equal Justice Initiative, retrieved 2017). It was replaced by mass incarceration and the death penalty for rape. From 1930 to 1964, 89% of those executed for rape were Black (*Kennedy v. Louisiana*, 2007, p. 8). “No white man has *ever* been executed in this country for raping a Black woman” [emphasis in original] (Socialist Women’s Caucus, 1975, cited in Davis, 1981, p. 40).

Racism in rape convictions remains to this day. In 2017, the National Registry of Exonerations reported that:

According to surveys of crime victims, about 70% of white sexual assault victims were attacked by white men and only about 13% by Black men. But 57% of white-victim sexual assault exonerees are Black (101/177), and 37% are white—which suggests that Black defendants convicted of raping white women are about eight times more likely to be innocent than white men convicted of raping women of their own race [citations omitted]. (Gross, 2017, p. 12).

The racism we ignore also denies Black women protection from sexual assault, as it has since the first slaves were brought to this country. “One of racism’s salient historical features has always been the assumption that white men—especially those who wield economic power—possess an incontestable right of access to Black women’s bodies” Angela Davis (1971, p. 175). This endemic racism prevents many women of color from looking to the state for justice.

Nearly invisible is the role of sexual assault in subjugating Indigenous peoples, which continues to this day. Lifetime rates of sexual assault against Indigenous women are somewhat higher than against white women (56.1% v. 49.7%), but for completed penetration the rates more than double (29.5% v. 13.6%) (Rosay, 2016). The same is true for Indigenous men (lifetime: 27.5% v. 20.9%; penetration only: 10.8% v. 5.1%). More remarkable is the fact that 96% of lifetime sexual violence against Indigenous women is perpetrated by someone of another race. For Indigenous men, it is only slightly lower at 89%. By contrast, perpetrators of sexual violence against white women and men are overwhelmingly intraracial at 91%.

Sexual violence is also used to subdue and exclude LGBTQI individuals, who experience higher rates of sexual assault than the heterosexual population. The federal Victims of Crime Office reports that 50% (2014, June) of transgender people are sexually abused or assaulted at some point in their lives). Forty percent of gay men and 47% of bisexual men report experiencing sexual violence other than rape (Human Rights Watch, retrieved 2017).

TJ/RJ IN COMMUNITIES OF COLOR

Because the CJS is so biased against people of color, they are notable in creating alternatives, including RJ and TJ models. Motivated by the historical and current racism of the criminal justice system, women of color in particular have maintained a focus on social change that does not rely on the CJS and are creating new models to deal with violence in their communities (RAINN, 2015).

[By 2000, women of color] came to understand that the once-radical analysis of violence against women had narrowed so greatly that almost all remnants of a social justice approach had virtually disappeared. The legacy of the lesbians of

color, particularly Black lesbians, who built the movement had disappeared from the collective memory of the mainstream movement.

(INCITE!, 2006, p. 2)

From this realization, 1,000 women of color gathered in conference in 2000. Andrea Smith, the conference coordinator, described the challenge facing them:

Sexual/domestic violence within communities of color cannot be addressed seriously without dealing with the larger structures of violence, such as militarism, attacks on immigrants and Indian treaty rights, police brutality, the proliferation of prisons, economic neo-colonialism, and institutional racism....

The challenge women of color face is to combat both personal and state violence. We must develop strategies that assure safety for survivors of sexual/domestic violence without strengthening the oppressive criminal justice apparatus.

(Ptacek, 2010, p. 17)

INCITE! WOMEN OF COLOR AGAINST VIOLENCE

One result of the conference was formation of the organization INCITE! Women of Color Against Violence, which defines its purpose as “... a nation-wide network of radical feminists of color working to end violence against women, gender non-conforming, and trans people of color, and our communities. We support each other through direct action, critical dialogue, and grassroots organizing” (<http://incite-national.org>, retrieved 2017).

INCITE!’s anthology, *Color of Violence* (2006), included an article by a collective of women of color from Seattle’s Communities Against Rape and Abuse (CARA), titled “Taking Risks: Implementing Grassroots Community Accountability Strategies” (p. 250). In it, CARA sets forth guidelines for community accountability processes, noting that

they must be “creative and flexible,” as well as structured, since no two communities or conflict situations are the same. The ten guidelines (accountability principles) are:

- Recognize the humanity of everyone involved.
- Prioritize the self-determination of the survivor.
- Identify a simultaneous plan for safety and support for the survivor as well as others in the community.
- Carefully consider the potential consequences of your strategy.
- Organize collectively.
- Make sure everyone in the accountability-seeking group is on the same page with their political analysis of sexual violence.
- Be clear and specific about what your group wants from the aggressor in terms of accountability.
- Let the aggressor know your analysis and your demands.
- Consider help from the aggressor’s community. They have more credibility with him.
- Prepare to be engaged in the process for the long haul.

(INCITE!, 2006, pp. 250-256)

CARA describes three scenarios with different approaches and different outcomes. In the first, a woman from Youth Empowered approached CARA after experiencing sexual harassment by a leader in her group. While the aggressor never admitted responsibility, his organization removed him from the leadership and Youth Empowered undertook to address its institutional sexism.

The second scenario involved a loosely knit music and arts community in which one popular musician assaulted two women. Members of the community sought advice and support from CARA. Though they designed a comprehensive strategy, the offender would not participate in the process or admit any wrongdoing. Met with this intransigence, the group switched tactics and focused on community-building, education, and prevention.

In the third scenario, a member of Unido had been sexually assaulting women in the group for some time. With CARA's guidance and support and organizing women within Unido, survivors devised a process that included the abuser's acceptance of responsibility, his stepping down from leadership, and entry into culturally competent counseling, monitored by Unido, which also agreed to pursue intensive educational work on sexual violence.

BLACK YOUTH PROJECT 100

In November 2015, the Black Youth Project 100 (BYP100, 2017) entered into a transformative justice process (Transforming Harm, 2017), when they were alerted to sexual violence by one of their members. BYP100 is a group of young Black people "dedicated to creating justice and freedom for all Black people through building a collective focused on transformative leadership development, direct action organizing, advocacy and education using a Black queer feminist lens" (retrieved 2017 from byp100.org/about/).

Three years after Kyra was sexually assaulted by Malcolm, a member of BYP100, she publicly revealed the incident. As a Black woman, Kyra understandably did not look to the criminal justice system. Within three days of Kyra contacting BYP100, they agreed together to address the harm using a community accountability model. Kyra approved two experts in restorative justice to work with her in devising and implementing it. The RJ experts also acted as a support team for Kyra as she went through what turned out to be a 15-month process. The survivor team monitored an accountability team that worked with Malcolm and assured the process was survivor-centered.

RJ Expert and Survivor Team member Mariame Kaba pointed out the essentials of a successful community accountability process: "1. The expectations are made clear and the goals are attainable. 2. Those involved share a value in the possibility of

transformation and in the importance of non-punitiveness (even if people occasionally waver)” (Transforming Harm, 2017)

Malcolm’s team, which also included an expert in RJ/TJ, followed the lead of Kyra’s team, adopting Kyra’s goals for the process, including Malcolm’s public admission of harm, his removal from movement spaces, and, to end the process, a circle where he would meet Kyra face to face with her support team and the accountability team. Xavier, Lead Facilitator of Malcolm’s team, stated, “The job of Malcolm’s support team was to hold a space where he could question and reflect upon the thoughts and behaviors that caused him to do harm while bringing tools to prevent him from doing the same thing to anyone else again” (Transforming Harm, 2017). Malcolm’s initial admission of harm was posted on Facebook:

When someone says I’ve harmed them, I do not believe I get to tell them how they’ve been harmed. I want to publically [sic] apologize to Kyra for the harm I caused her. I am committed to and am engaged in a survivor led transformative justice process.... I am committed to being held accountable in a way that reflects the values of the broader movement community I am part of.

(Transforming Harm, 2017)

Despite anxiety and skepticism approaching the circle, Kyra, Malcolm, and team members were satisfied with the process. (The following quotations are from Transforming Harm, 2016, and can be found on the same page as the 2017 quotes on their website. See References.)

Kyra: I was surprised by and so thankful for the work that Malcolm and his team have done. I have never seen an abuser own up to his harmful behavior in such a real way and work so hard to change it.... I have faith that this process has made an impact on him and that he will use his experience not only to better himself, but to educate other men about sexual violence and toxic masculinity.

Malcolm: I felt overcome with remorse, empathy & gratefulness after sharing space with Kyra. I am appreciative of her strength to be engaged in this process and being open enough to allow me an opportunity to make amends. Being able to apologize directly to Kyra for sexual assault without needing to contradict myself or try to misname the harm was the first step in my process I felt took the most time to accomplish.

Mariame: [W]hat has mattered to me throughout the past few months was to support Kyra to the best of my ability and to also make sure that Malcolm was supported in making personal changes through the process.... I am humbled and so happy that all parties feel as though this experience has contributed to healing. CA [Community Accountability] processes cannot erase harm. At best, they can reduce the impact(s) of harm and they can encourage people in their ongoing healing journeys.... CA processes test everyone and can be some of the most difficult physical and emotional work that we can undertake.

Both Mariame and Kyra stressed that RJ/TJ is not for everyone or every situation. As Mariame wrote, “There is no coercion involved because that would replicate the oppressive forces that we seek to dismantle. All parties must choose freely to participate....”

Kyra offered:

Justice and accountability come in different forms. However, in my experience, it rarely comes to us (especially for Black women) by way of police, juries, and jail. My process allowed me not only to hold Malcolm accountable for his actions but to also reeducate him so that he hopefully won't harm anyone else in the future. That was important to me.

GENERATION FIVE (GEN5)

Gen5 (retrieved from www.generationfive.org, 2017) has taken on the difficult problem of developing a community-based, transformative justice process for responding to child sexual abuse (CSA), both to address individual situations and “to change the norms and political and economic conditions that are the root causes of CSA,” which include a power-over paradigm manifested in systems of oppression, domination, and exploitation, in which a group with certain characteristics is valued over a group that is defined by lacking those characteristics. Social benefits accrue to people within the valued group. In the US, society is divided by race, wealth, gender, sexual orientation and identity, nationality/ethnicity/legal status, religion, dis/ability, and age. In any attempt at TJ/RJ or other ways of responding to interpersonal violence, the intersectionality of identities must be acknowledged and made a part of the process.

Gen5 highlights the fact that 90% of child sexual abuse is perpetrated by someone known to the child (34.2% by family members, 58.7% by acquaintances) and 7% by strangers, yet the public and the criminal justice system focus almost entirely on the 7% of abuse by strangers. Laws that apply to anyone convicted of a sex crime of whatever seriousness are designed for situations of stranger abuse, for example, prohibitions on living, and, in some jurisdictions, physically coming within a certain distance (1000 to 2000 feet) of a place where children regularly congregate, such as schools, daycare centers, and parks. Given that only 5.6% of convicted sex offenders commit another sex offense, this condition, though a major part of protective efforts nationally, does little, if anything, to stop child sexual abuse (Durose et al., 2016).⁴ Like other post-sentence collateral consequences, residence and associational restrictions isolate former offenders to the extent that they may be forced into homelessness, where the only legitimate place to live is under bridges and in uninhabited rural areas, making it difficult to obtain work or services, or check in with

⁴ I have not seen statistics on what percentage of those who reoffend are known to the victim. To the extent that they are, registration, restrictions, and disabilities are useless.

parole officers. Banishment of those who have harmed serves society's appetite for revenge, but does nothing to make anyone safer.

While it may be an understandable impulse to villainize, banish, or enact violence upon the person who has sexually abused, we must engage, name the harm, and call upon this person's dignity in order to hold standards that support safety, connection, and dignity for everyone involved, and above all for those most directly impacted by the harm (Gen5b, p. 55).

Especially when dealing with intrafamily child sex abuse, it is important to recognize that the child who has been victimized may have conflicting feelings toward the one who has abused them, love as well as fear and anger. They⁵ may experience further harm if the abuser they love goes to prison (for which they may feel responsible) and their family is broken up. A TJ/RJ process offers a chance to restore what is good in their relationship with the abusive family member; as many survivors have said, "I love him. I just want the abuse to stop." In addition, healing and transforming families, including the one who has caused harm, is the building block on which transformed communities and, ultimately, society are made. Again, from Gen5b: "By standing for everyone's need for healing, we challenge the dehumanizing logic that is central to systems of oppression, domination, and abuse" (p. 56).

In promoting a TJ process, Gen5b notes: "When the person who has been sexually abusive is able to take accountability for their actions and to make meaningful reparations, greater healing is possible for everyone involved." And, "Children who receive support from a nonoffending parent or from other protective adults seem to fare better, despite the negative impacts of the abuse" (p.12).

⁵ Here, "they" is used as a singular pronoun.

The healing process includes the person who has offended: Providing for accountability that preserves the offender's humanity is a necessary element of TJ/RJ practice when he or she has sexually abused a child.

Gen5's process of accountability and transformation requires that the person who has been harmful:

- Stops the harm
- Acknowledges the harm they have caused
- Feels remorse
- Takes measures to address the harm caused—restitution, reparation
- Takes measures to prevent future harm
- Works to understand the root causes of their harmful behavior, and to heal the wounds that created this dehumanizing action
- Engages in the ongoing work of accountability, healing, and integration
- Takes action to support others to heal, or to be a part of changing community and social conditions that allow for CSA and other forms of violence.

(Gen 5b, p. 55)

Gen5's underlying philosophy is that, "Rather than removing from community and punishing people who have done harm, accountability for past behavior and transformation of future behavior has to be supported and enforced by those with whom they have invested relationship" (Gen 5b, p. 55). All of this is centered on the safety and needs of the person harmed.

Though child sexual abuse occurs in all demographics, Gen5 recognizes the significant differences in the sexual abuse of children, from the offender's motivation to the acts of abuse and the relationship between offender and victim. For example, 30 to 50% of those who sexually abuse children are adolescents or children, who are more amenable to change than adults (Finklehor, Ormrod, & Chaffin, 2009, p. 14). And, contrary to

popular belief, most of those who abuse children are not pedophiles, but situational or opportunistic offenders. Gen5 explains:

There are no simple explanations for why someone sexually abuses a child. It is a diverse group of individuals who sexually abuse children, with a wide range of motivations. To answer “why” we must look at multiple factors, including their individual makeup and personal history, the relationships and community surrounding the sexual abuse, and the societal beliefs and norms within which child sexual abuse is rampant....

We must continue to develop our capacity to fathom that people we know and respect may be sexually abusing children. We must continue to develop our capacities to prioritize safety, accountability, and healing amidst seemingly overwhelming impulses to lash out or shut down or disconnect. And we must continue to cultivate the hope that there is another way.

(Gen5b, 2017, p. 15)

STATE RECOGNITION OF TJ/RJ

The failure to change the social norm that allows violence against women, children, and vulnerable populations to persist has not gone unnoticed within some state structures concerned with the issue, influenced (and fertilized) as they are by the feminist movement. For example, the Oregon Attorney General’s Task Force on Sexual Violence in its 2006 Plan of Action concluded that “One important message gleaned from the overview of the field is that the anti-violence movement’s historic over-reliance on the criminal justice system has not effectively reduced or prevented violence.” The Task Force recommended a way forward:

We join with other states in recommending that communities add alternatives to legal system intervention, such as community accountability strategies (e.g. taking collective action to assert that violence is unacceptable). In essence,

these approaches expand the focus of violence prevention beyond individual, interpersonal interventions to emphasize community and societal change.

(Oregon Attorney General's Task Force on Sexual Violence, 2006, p. 8)

IMPEDIMENTS TO TJ/RJ

While the criminal justice system now recognizes that violence against women is widespread and is at least as serious and harmful as other behavior designated criminal, it has brought neither justice nor safety to a large segment of the population. Given its construction on the dominator model that replicates the unequal power relations at the core of violence, it simply cannot bring either justice or safety. Moreover, rehabilitation has long since been replaced by punishment as the overriding purpose of the CJS. Punishment that involves degradation, sets one apart from others, and marks one as lesser (a felon, a sex offender) can neither rehabilitate that person nor restore them to the community as a safe, productive member. It can and does happen, of course, but in spite of the system, not because of it. Moreover, only a minority of crimes are resolved in the CJS. According to Sered (2017), fewer than 50% of crimes are reported to the police (p. 9). Of those, half go to a grand jury. Reporting of sexual assault to police is much lower, an average of 25% from 2000 to 2015 (Bachman, 1998; Truman & Planty, 2012).

Both the feminist anti-violence movement and the TJ/RJ movement seek to change community norms. Both approaches to harm have limitations. The feminist anti-violence movement has relied too much on the criminal apparatus of the state, which oppresses people of color, immigrants, and other minority groups, as well as reinforces the dominator paradigm in its treatment of offenders. TJ/RJ has little immediate impact on larger social systems, most of which would be undermining their own power and authority by adopting a TJ/RJ model. It may, however, have a long-term impact on reducing violence.

Foremost among impediments to using a TJ/RJ process in response to violence is the necessity of a community that both the survivor and the one who perpetrated the violence acknowledge. It can be an existing community like BYP100, of which Malcolm was a member, and Kyra trusted their willingness to hold her well-being at the center of their process. The community need not be pre-existing. Four or more individuals trained in TJ/RJ and acceptable to both parties can come together to undertake the process. However, there is no denying that building community, even short term, is a challenge in the United States, where the highest value is individualism, many people don't know their neighbors, and many may have a group of friends but no community as such. Family can be a community, but it also can be too biased to participate in a TJ/RJ process. And some have a religious community. However, few people are trained and skilled in TJ/RJ. It needs stressing that both parties must accept the legitimacy of the community.

Another possible barrier is the requirement that the person who caused harm make an admission of responsibility as a precursor to initiating the process, as CARA experienced in the cases discussed above. To do so, the sessions must be confidential and not available to use in court should TJ/RJ fail. Yet, TJ/RJ emphasize the need for transparency. In Malcolm's case, his admission of guilt was posted on Facebook. Moreover, those who commit sex crimes have a high incidence of denial (Schneider & Wright, 2004). A concern is that offenders may attempt to avoid prison or other penalties by admitting guilt and insincerely expressing remorse. Whether this might change through experiencing TJ/RJ has not been tested, to the knowledge of this author.

Not all instances of violence lend themselves to a TJ/RJ process, as Mariame and Kyra point out. A young man who ignores his date's "no," believing she doesn't mean it, may be more amenable to change than someone who sexually assaults a stranger. Some individuals will require long-term sex offender treatment, while adolescents are the

least likely to reoffend once the behavior is addressed.⁶ Youth, because of their still-developing brains, may be more responsive to alternative justice, as the Common Justice project shows (Sered, 2017). Common Justice works with 16- to 24-year-old defendants, the group with the highest criminal offense rate. TJ/RJ may be useful when criminal or civil action is no longer possible due to expiration of a statute of limitations, there is a lack of evidence, or to spare a victim cross-examination and other difficulties of a trial. The community cannot deal with a sexual psychopath through TJ/RJ. While the criminal justice system may not handle them appropriately, public safety requires the more robust intervention, including institutionalization.

Advocates for survivors of sexual and intimate violence express concern that an alternative process to the CJS may return us to the days of privatizing those crimes, thereby diminishing their importance, particularly where women and, especially, women of color are concerned. In addition, they are worried that facilitators of TJ/RJ will be inadequately trained in the power and control dynamics of ongoing intimate abuse. Another fear is that these alternatives leave no room for survivors' anger and that they will be pressured to forgive (Goodmark, 2015).

Moreover, not all TJ/RJ models address the role of gender in the origin of the violence, nor the gender bias of the community (Frederick & Lizdas, 2003, pp. 34-35). The length of the process can also be an impediment. BPY100 devoted 15 months to RJ with Malcolm and Kyra, which is a commitment not all communities or parties can, or are willing to, make. As Frederick and Lizdas point out, “[C]hanges in belief systems occur predominantly over long periods of time with continuous and consistent messaging from the community” (p. 39).

⁶ Whether sex offender treatment programs should be a part of TJ/RJ needs examination to determine if they incorporate basic principles of treating offenders with humanity and dignity, an inquiry beyond the scope of this article.

A HOPEFUL CONCLUSION

Thousands of women across the country have come forward to expose the dirty secret that sexual assault and sexual harassment are “normal” in our dominator culture. Black Lives Matter arose out of the persistent, widespread, yet too often invisible (to white society) racism that locks up millions of Black and brown people, while police murder young Black men and women with impunity. This, too, is “normal” in our dominator culture that exists by “othering.”

When women are valued less than men and considered sexual objects available to any man, sexual assault becomes normal. A culture structured on the dominator model can only respond to sex crimes using the tools of domination - control, punishment, ostracism, and shaming by the criminal system. In a racist society, those tools are used disproportionately against people of color and cannot end sexual assault because it is built into the social structure of dominance.

People - often young people of color - are saying “no” to the dominator model and fashioning alternatives to its destructiveness, alternatives that seek to build a compassionate society in which everyone is valued; in which those who offend hold themselves accountable, make amends, and are welcomed back into the community; in which those who have been harmed find true healing, as do those who harm. And they have extended these programs to the most despised offenders - those guilty of sex crimes. While some antiviolence advocates resist any noncriminal response to sexual assault, others realize that the present system is not working. Sexual violence remains widespread after decades of using the criminal justice system to confront it.

Transformative Justice, at its best, changes beliefs as well as behavior, and has the potential to change our punitive culture. While it is a promising alternative to a punishment-oriented system, it lacks resources and consideration from mainstream society. Ultimately, we need to redirect some of the billions of dollars spent on prisons,

jails, and overburdened probation and parole systems, to TJ/RJ efforts. The first step, however, is informing a wider audience that alternatives exist and are worth trying.

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